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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH PERKINS,

Defendant and Appellant.

H037931

(Monterey County  
Super. Ct. Nos. SS100810A,  
SS101331A)

**INTRODUCTION**

Defendant Joseph Perkins appeals from a post-judgment order denying his motion for additional presentence conduct credit under Penal Code section 4019.<sup>1</sup> For reasons that we will explain, we will affirm the order.

**FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>**

In March 2011, in case No. SS100810A, defendant pleaded no contest to two counts of receiving stolen property (former § 496, subd. (a)). The offenses took place on or about January 26 and February 6, 2010. In case No. SS101331A, defendant pleaded no contest to assault by means of force likely to produce great bodily injury (former

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> By order of May 18, 2012, we have granted defendant's request for judicial notice of the record in his prior appeal, H037055, *People v. Perkins*. Our summary of the background includes some information that we have taken from the record in the prior appeal.

§ 245, subd. (a)(1)). The offense took place on or about May 16, 2010. In case No. SS110369A, defendant pleaded no contest to making criminal threats (§ 422). Defendant entered the pleas in all three cases pursuant to a plea bargain in which he would receive a total term of five years in prison.

In May 2011, the trial court sentenced defendant to a total term of five years in prison pursuant to the plea bargain. Regarding presentence custody credits, in case No. SS100810A, the court granted defendant 134 days of custody credits, consisting of 90 actual days plus 44 days conduct credit. In case No. SS101331A, the court granted defendant 540 days of custody credits, consisting of 360 actual days plus 180 days conduct credit. No custody credits were awarded in case No. SS110369A.

In June 2011, defendant filed a notice of appeal from the judgment. While the appeal was pending, the trial court corrected defendant's presentence custody credits in case No. SS100810A by granting him one additional day of actual custody credit, for a total of 135 days of custody credits. The abstract of judgment was amended accordingly. Defendant subsequently filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, in his appeal from the judgment. This court affirmed the judgment in an unpublished opinion. (*People v. Perkins* (Jan. 26, 2012, H037055).)

In the meantime, on November 22, 2011, defendant filed a motion in the trial court seeking additional presentence conduct credit in case Nos. SS100810A and SS101331A. Defendant contended that, based on equal protection principles, his conduct credit should be calculated pursuant to the October 2011 version of section 4019, which was operative after he was sentenced in May 2011, and that he was therefore entitled to 46 additional days in case No. SS100810A and 180 additional days in case No. SS101331A. The district attorney filed written opposition to the motion, and defendant filed a reply brief in support of the motion.

On February 1, 2012, the trial court denied defendant's motion for additional conduct credit, finding no equal protection violation in the prospective application of the

October 2011 version of section 4019. On February 6, 2012, defendant filed a notice of appeal from the court's order.

### **DISCUSSION**

Defendant contends that his conduct credit in case Nos. SS100810A and SS101331A should be calculated pursuant to the current version of section 4019, which was operative after he was sentenced in May 2011, and that, under the current version, he is entitled to additional conduct credit. Although he acknowledges that the current version of section 4019 "provides that it is applicable solely to cases where the offenses were committed *on or after* October 1, 2011" (italics added), he contends that the equal protection clauses of the state and federal Constitutions require that the current version be applied to him.

The Attorney General contends that, based on *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*) and *People v. Lara* (2012) 54 Cal.4th 896 (*Lara*), which were decided after defendant filed his opening brief in this appeal, defendant is not entitled to additional conduct credit.

The current version of section 4019 generally provides that a defendant may earn conduct credit at a rate of two days for every two-day period of actual custody. (§ 4019, subds. (b), (c) & (f).) However, as defendant acknowledges, the current version of section 4019 states that the conduct credit rate "shall apply prospectively and shall apply to prisoners who are confined to a county jail [or other local facility] for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." (§ 4019, subd. (h).) In this case, defendant committed his crimes and was sentenced *prior* to October 1, 2011. Thus the October 2011 version of section 4019, which provides for prospective application, does not apply to defendant. (§ 4019, subd. (h); *Brown, supra*, 54 Cal.4th at p. 322, fn. 11; *Lara, supra*, 54 Cal.4th at p. 906, fn. 9; *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1550 (*Ellis*).)

We are not persuaded by defendant's argument that the equal protection clauses of the state and federal Constitutions require that the October 2011 version of section 4019 be retroactively applied to him.

"The concept of equal protection recognizes that persons who are similarly situated with respect to a law's legitimate purposes must be treated equally. [Citation.] Accordingly, ' "[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' " [Citation.] 'This initial inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged.' " [Citation.]" (*Brown, supra*, 54 Cal.4th at p. 328.)

We find *Brown* instructive on the equal protection issue raised by defendant in this case. In *Brown*, the California Supreme Court held that a former version of section 4019, effective January 25, 2010, applied prospectively, and that the equal protection clauses of the state and federal Constitutions did not require retroactive application. (*Brown, supra*, 54 Cal.4th at p. 318.) In addressing the equal protection issue, the court determined that "prisoners who served time before and after [the January 2010 version of] section 4019 took effect are not similarly situated . . . ." (*Brown, supra*, at p. 329.) On this point, the California Supreme Court found *In re Strick* (1983) 148 Cal.App.3d 906 (*Strick*), "persuasive" and quoted from that decision as follows: " 'The obvious purpose of the new section,' . . . 'is to affect the behavior of inmates by providing them with incentives to engage in productive work and maintain good conduct while they are in prison.' [Citation.] '[T]his incentive purpose has no meaning if an inmate is unaware of it. The very concept demands prospective application.' [Citation.] 'Thus, inmates were only similarly situated with respect to the purpose of [the new law] on [its effective date], when they were all aware that it was in effect and could choose to modify their behavior accordingly.' [Citation.]" (*Brown, supra*, at p. 329.) The California Supreme Court also

disagreed with the defendant's contention that its decision in *People v. Sage* (1980) 26 Cal.3d 498 "implicitly rejected the conclusion" that the Court of Appeal reached in *Strick*, namely "that prisoners serving time before and after a conduct credit statute takes effect are not similarly situated." (*Brown, supra*, at p. 329.)

Defendant argues that his case is analogous to *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*), where the California Supreme Court concluded that equal protection required the retroactive application of a statute granting credit for time served in local custody before sentencing and commitment to state prison. In *Brown*, however, the California Supreme Court explained that "*Kapperman* does not hold or suggest that prisoners serving time before and after the effective date of a statute authorizing *conduct* credits are similarly situated." (*Brown, supra*, 54 Cal.4th at p. 330.)

Lastly, we observe that in a footnote in *Lara*, the California Supreme Court rejected the contention, similar to the one made by defendant in this case, that the prospective application of the October 2011 version of section 4019 denied the defendant equal protection. (*Lara, supra*, 54 Cal.4th at p. 906, fn. 9.) Citing *Brown*, the California Supreme Court in *Lara* explained that prisoners who serve their pretrial detention before the effective date of a law increasing conduct credits, and those who serve their detention thereafter, "are not similarly situated with respect to the law's purpose." (*Lara, supra*, at p. 906, fn. 9; but see *People v. Verba* (2012) 210 Cal.App.4th 991, 995-996.)

Following *Brown* and *Lara*, we determine that defendant is not entitled to additional conduct credit under the October 2011 version of section 4019. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *Ellis, supra*, 207 Cal.App.4th at p. 1548 ["prospective-only application" of the October 2011 version of section 4019 does not violate equal protection].)

### **DISPOSITION**

The trial court's February 1, 2012 order is affirmed.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MÁRQUEZ, J.